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I. INTRODUCTION

A matter that has received little attention from scholars is which contract-law issues should be questions of fact for the jury and which should be questions of law for the judge.[1] Likewise, courts usually just state in conclusory fashion that a particular issue is either one of fact or one of law, with no analysis as to why it should be considered one or the other.[2] Yet a review of the case law discloses considerable disagreement among the courts as to whether particular contract-law issues are for the jury or the judge, suggesting that the answer is not as easy as simply determining whether an issue is one of "fact" or

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1. A notable exception is the issue of interpreting written contracts. *See, e.g.*, William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 932. Professor Mark Gergen has also written on the role of the judge and jury in contract cases. *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 409-10 (1999).

2. William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 458 (1992).

"law."[3] Rather, many such issues involve the application of law to facts, a question that in many situations could properly be decided by either the jury or the judge.

This Article addresses one particular area in which courts have disagreed about whether the issue is one of fact for the jury or one of law for the judge: Whether a hybrid contract's predominant purpose is for the sale of goods, which in turn determines whether Article 2 of the Uniform Commercial Code or the common law (or some other source of law) applies to the transaction. This Article maintains that courts have failed to sufficiently analyze whether this issue should be decided by the jury or the judge, and concludes that the trial judge should have discretion, based on the circumstances of the case, to decide whether the issue should be for the judge or the jury.

Part II of this Article provides a background of the predominant-purpose test. Part III discusses when issues are typically considered issues of fact for the jury and when they are considered issues of law for the judge, discussing the so-called functional test for allocating responsibility between the judge and the jury. Part IV discusses the disagreement among courts as to whether the predominant-purpose test is to be applied by the jury or the judge. Part V applies the functional test's factors to the issue of a contract's predominant purpose and concludes that the test does not provide a clear answer as to whether the issue should be for the judge or the jury. Part VI, therefore, proposes that the trial judge should have discretion to decide whether the contract's predominant purpose should be considered an issue of law for the judge based on the particular circumstances of the case. Part VII is a brief conclusion.

II. PREDOMINANT-PURPOSE TEST

The Uniform Commercial Code (U.C.C.) was drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws (now also known as the Uniform Law Commission)[4] in the 1940s and 1950s, with most states having adopted it by

3. *Compare* Melford Olsen Honey, Inc. v. Adee, 452 F.3d 956, 964 (8th Cir. 2006) ("Although the availability of the commercial impracticability defense is a legal issue, a jury must determine whether the facts involved in the case sufficiently support such a defense."), *and* Inland Wetlands & Watercourses Agency v. Landmark Inv. Grp., Inc., 590 A.2d 968, 971 (Conn. 1991) ("Whether there has been [a mutual] mistake is a question of fact."), *with* T.S.I. Holdings, Inc. v. Jenkins, 924 P.2d 1239, 1248 (Kan. 1996) ("Whether a party should be excused from its obligations under a written agreement because of impracticability of performance is a question of law."), *and* Stewart v. Wal-Mart Stores E., LP, No. 3301 EDA 2015, 2016 WL 4975248, at *2 (Pa. Super. Ct. Sept. 16, 2016) (holding that mutual mistake presents a pure question of law).

4. *See About the ULC*, UNIFORM LAWS COMM'N, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC [https://perma.cc/MKF5-N9VS] (noting that

the mid-1960s.[5] The U.C.C.'s goals were "(1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions."[6]

Article 2 of the U.C.C. applies to "transactions in goods," unless the context otherwise requires.[7] "Goods" are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action."[8] The definition of "goods" is also extended to certain things that are not movable at the time of identification to the contract, such as "the unborn young of animals."[9] They can also include things to be severed from land, depending on the circumstances.[10] For

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the Commission is known as the Uniform Law Commission as well as the National Conference of Commissioners on Uniform State Laws).

5. Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 277 (1998). Louisiana is the only state that has not adopted Article 2. *See, e.g.*, Note, *Contracts for Goods and Services and Article 2 of the Uniform Commercial Code*, 9 RUTGERS-CAMDEN L.J. 303, 303 n.3 (1977) [hereinafter *Contracts for Goods and Services*].

6. U.C.C. § 1-103(a)(1)-(3) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

7. *Id.* § 2-102. Although Article 2 is titled "Sales," some courts have held that because it applies to "transactions in goods," it applies in certain situations to transactions in goods that do not include a sale of goods. *See, e.g.*, Wells v. 10-X Mfg. Co., 609 F.2d 248, 254 n.3 (6th Cir. 1979) ("The use of the term transaction rather than sale in U.C.C. § 2-102 is significant in that it makes clear that the reach of Article 2 goes beyond those transactions where there is a transfer of title."), *abrogated on other grounds by* Underwriters at Interest v. SCI Steelcon, 905 F. Supp. 441, 443 (W.D. Mich. 1995); Skelton v. Druid City Hosp. Bd., 459 So. 2d 818, 821 (Ala. 1984) (holding that Article 2 applies to certain transactions in goods that do not involve a sale, and noting that numerous courts have so held); Mieske v. Bartell Drug Co., 593 P.2d 1308, 1312 (Wash. 1979) ("Had the drafters of the code intended to limit article 2 to sales they could have easily so stated."). Certain provisions, however, are expressly limited to a contract for the sale of goods, such as the Statute of Frauds. *See* U.C.C. § 2-201 (applying to "a contract for the sale of goods for the price of $500 or more"). The definition of *goods* however, seems to incorporate a sales requirement. *See* U.C.C. § 2-105(1) (defining *goods* as "all things . . . which are movable at the time of identification to the *contract for sale*.") (emphasis added).

8. U.C.C. § 2-105(1). Although the express exclusion of investment securities and things in action would seem unnecessary because they are not movable things, presumably the drafters intended to make clear that the documents evidencing the investment securities or chose in action were not goods that rendered such a transaction subject to Article 2. *See* 2 LARY LAWRENCE, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-105:60 (3d ed. 2016) ("Even when the investment security is written on a tangible piece of paper, the value of the security is in the rights evidenced by the paper, and not in the paper itself. As a result, the piece of paper evidencing the security is not a movable thing within the Code's definition of goods.").

9. U.C.C. § 2-105(1).

10. *Id.*; *see also* 2 LAWRENCE, *supra* note 8, § 2-105:37 ("An exception to the requirement that goods be movable at the time of identification are those things that come within

example, "goods" includes minerals and the like (such as oil and gas) and structures attached to the land when the seller is to do the severing.[11] They also include growing crops, and other things attached to land (other than structures) provided they can be severed without material harm to the land.[12] The principal examples of transactions that are *not* governed by Article 2 include a contract for the sale of an interest in land,[13] the provision of services,[14] and the sale of an intangible right,[15] such as intellectual property[16] and the settlement of a dispute.[17]

If a transaction involves only the sale of goods or only the sale of something else (such as an interest in land, a service, or an intangible right), determining whether Article 2 or the common law applies (or some other source of law) is not difficult.[18] But many contracts involve both the sale of goods and something else, typically a service[19]—a so-called hybrid or mixed contract[20]—and thus "the problem of whether Article 2 should apply to a particular transaction arises frequently."[21] Although the U.C.C. perhaps permits parties to agree

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the scope of U.C.C. § 2-107. Such things are 'goods' even though, at the time of identification, they are part of realty and therefore immovable.").

11. U.C.C. § 2-107(1).

12. *Id.* § 2-107(2).

13. *See* Ryan v. Weiner, 610 A.2d 1377, 1383 (Del. Ch. 1992) ("[T]he UCC does not, of course, apply to sales of land . . . ."); 2 LAWRENCE, *supra* note 8, § 2-105:32 ("The things that are goods are movable. This confirms the conclusion that goods involve personal property to the exclusion of real estate.").

14. *See, e.g.*, Strickfaden v. Park Place Mortg. Corp., No. 07-15347, 2008 WL 3540079, at *4 (E.D. Mich. Aug. 12, 2008) ("Defendants in this case were providing services, not goods. The UCC therefore does not apply."); Crystal L. Miller, Note, *The Goods/Services Dichotomy and the U.C.C.: Unweaving the Tangled Web*, 59 NOTRE DAME L. REV. 717, 717 (1984) ("[I]f a contract is purely for the performance of services, Article 2 does not apply.").

15. Lansing Trade Grp., LLC v. OceanConnect, LLC, No. 12-2090-JTM, 2012 WL 2449514, at *4-5 (D. Kan. June 26, 2012).

16. *See* 2 LAWRENCE, *supra* note 8, § 2-105:82 ("An agreement that is predominantly a transfer of intellectual property rights is not one for the sale of 'goods' subject to Article 2.").

17. Akrosil Div. of Int'l Paper Co. v. Ritrama Duramark, Inc., 847 F. Supp. 623, 627 (E.D. Wis. 1994).

18. *See* Miller, *supra* note 14, at 718-19 ("If the contract in question is clearly one for the sale of goods or the performance of services, the question of whether the U.C.C. applies is answered easily.").

19. *See* 2 LAWRENCE, *supra* note 8, § 2-105:82 ("[T]he goods/service transaction is the most common of the hybrid transactions . . . ."); Miller, *supra* note 14, at 719 ("[M]any contracts call for both the sale of goods and the performance of services.").

20. *See* Mo. Farmers Ass'n v. McBee, 787 S.W.2d 756, 760 (Mo. Ct. App. 1990) ("The contract here was a hybrid or mixed contract in that it was for both goods and services.").

21. *See* Miller, *supra* note 14, at 732 ("The problem of whether Article 2 of the U.C.C. applies to a transaction arises frequently."); *Contracts for Goods and Services*, *supra* note 5, at 303.

on whether Article 2 applies to their transaction,[22] this rarely happens, particularly after a dispute arises. The parties will therefore argue for the source of law that is most advantageous to them based on the dispute that has arisen,[23] with the source of law potentially determining who prevails in the litigation.[24]

Unfortunately, with one exception, the U.C.C. does not provide any guidance on determining whether or when Article 2 applies to a hybrid contract.[25] Courts have therefore developed a test to apply in such situations, the so-called predominant-purpose (or predominant-factor) test,[26] which is followed by a majority of the courts.[27] Under

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22. 2 LAWRENCE, *supra* note 8, § 2-105:101. Presumably, if the contract would otherwise be governed by Article 2, the specific requirements to disclaim warranties would need to be met if the parties desired Article 2 to not apply. *See* U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 2014) (setting forth the requirements for the exclusion or modification of warranties).

23. *See* David C. Olson & Jeffrey S. Rosenstiel, *Predicting When Construction Contracts Are Subject to Article 2 of the UCC*, 21 CONSTRUCTION LAW. 22, 22 (2001) ("The arguments for or against the application of the UCC are typically presented to obtain a strategic or substantive advantage, that is, applying a shorter statute of limitations or imposing some implied warranties on the transaction."); Miller, *supra* note 14, at 717 ("The dichotomy [between the U.C.C. and the common law] becomes crucial when one party wishes to assert rights under the U.C.C."); *id.* at 717 n.4 ("These rights can include warranty protections (§§ 2-312 to 2-318) and statute of limitations protections (§ 2-725). Article 2 must apply to a contract before an aggrieved party can claim its protections.").

24. *See Contracts for Goods and Services*, *supra* note 5, at 303 ("[T]he characterization may ultimately determine the result of the litigation (*e.g.*, whether a warranty will be implied or which statute of limitations will be applied) . . . ."). Of course, "[w]hen the non-Code law and the Code apply the same rule to the pending controversy, it is unnecessary to determine whether a hybrid transaction should be brought under the Code." 2 LAWRENCE, *supra* note 8, § 2-105:87.

25. *See* Miller, *supra* note 14, at 720 ("Article 2 does not provide any guidelines for interpreting contracts calling for both the sale of goods and the performance of services."); *Contracts for Goods and Services*, *supra* note 5, at 308 ("Nowhere is it stated in Article 2 that that article of the UCC is inapplicable to contracts involving goods and services."). The one exception is "the serving for value of food and drink to be consumed either on the premises or elsewhere." U.C.C. § 2-314(1). Article 2 provides that such a transaction is considered a sale to which Article 2's implied warranty of merchantability applies. *Id.*

26. The test has also been called the "dominant element" test. 2 LAWRENCE, *supra* note 8, § 2-105:88.

27. *See* Action Grp., Inc. v. NanoStatics Corp., No. 13AP-72, 2013 WL 6708395, at *8 (Ohio Ct. App. Dec. 17, 2013) ("When presented with a hybrid contract . . . the majority of courts, follow the predominant-purpose test to determine whether or not the UCC applies."). An alternative test is the so-called "gravamen-of-the-action" test. "Under this test, Article 2 would apply to the goods aspect of the transaction if that aspect of the transaction formed the gravamen of the action for relief." 1 WILLIAM D. HAWKLAND ET AL., HAWKLAND'S UNIFORM COMMERCIAL CODE SERIES § 2-102:2 (Carl Bjerre ed., 2017). This test has not, however, gained much support. *Id.*; *see also* 2 LAWRENCE, *supra* note 8, § 2-105:90 ("Some courts do not apply the dominant element test. One court, in what may be merely dictum, rejected the predominant element test for classifying hybrid contracts. In other states, Article 2 is applied to a hybrid contract without determining whether the goods element is predominant." (footnotes omitted)). There is also support for the argument that there is a "final product" test, which applies Article 2 as long as the final product is "goods." *See* Mil-

this test, if the contract is not divisible,[28] Article 2 applies to the entire transaction when the contract's predominant purpose is for the sale of goods and does not apply at all when the predominant purpose is for the other portion.[29] The party seeking Article 2's application bears the burden of proving that the contract's predominant purpose was the sale of goods,[30] though the trend perhaps is to apply Article 2 to hybrid contracts.[31]

The seminal case adopting the predominant-purpose test is *Bonebrake v. Cox*.[32] In *Bonebrake*, the parties entered into a contract for the sale of bowling equipment and its installation into the buyer's bowling alley.[33] In deciding whether Article 2 applied, the court stated:

> The test for inclusion or exclusion [from Article 2 of the U.C.C.] is not whether [the contracts] are mixed, but, granting that they are

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ler, *supra* note 14, at 726-27 (describing the "final product" test); *Contracts for Goods and Services*, *supra* note 5, at 309-12; *see, e.g.*, Carpel v. Saget Studios, Inc., 326 F. Supp. 1331, 1333 (E.D. Pa. 1971) (holding that a contract for taking wedding photographs was a transaction in goods governed by the U.C.C.); Lake Wales Publ'g Co. v. Fla. Visitor, Inc., 335 So. 2d 335, 336 (Fla. Dist. Ct. App. 1976) (holding that a contract to edit and publish certain pamphlets and other materials was governed by the U.C.C. because "[t]he items allegedly furnished by the appellant were specially produced or manufactured and were movable [and] any services rendered were of necessity directed to production of the items").

28. *See* Minn. Forest Prods., Inc. v. Ligna Mach., Inc., 17 F. Supp. 2d 892, 904 (D. Minn. 1998) (holding that the contract was divisible and that Article 2 did not apply to the services portion); 2 LAWRENCE, *supra* note 8, § 2-105:103 ("In some instances, the solution for a case involving a hybrid contract may be to find that the contract is divisible and, therefore, is, in fact, two contracts, one for the rendition of services and one for the sale of goods. As a result, an action on the service portion of the contract would not be governed by Article 2 while an action on the sales portion would be.").

29. *See* Midwest Mfg. Holding, L.L.C. v. Donnelly Corp., 975 F. Supp. 1061, 1067 (N.D. Ill. 1997) ("If a contract predominantly involves the sale of goods, the entire contract is subject to the UCC. If the contract is primarily one for non-goods, it is tested by other legal standards, such as the . . . common law." (citations omitted)).

30. Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523, 530 (7th Cir. 1999); Insul-Mark Midwest, Inc. v. Modern Materials, Inc., 612 N.E.2d 550, 555 (Ind. 1993); Nw. Equip., Inc. v. Cudmore, 312 N.W.2d 347, 351 (N.D. 1981); Pass v. Shelby Aviation, Inc., W1999-00018-COA-R9-CV, 2000 WL 388775, at *4 (Tenn. Ct. App. Apr. 13, 2000); *see also* 2 LAWRENCE, *supra* note 8, § 2-105:88 ("In determining whether Article 2 applies to mixed contracts for goods and services, the predominant factor test is applicable. The burden of proof in the case of a mixed contract is on the party who asserts that the contract is governed thereby.").

31. *See* BMC Indus., Inc. v. Barth Indus., Inc., 160 F.3d 1322, 1330 n.14 (11th Cir. 1998) (noting that some courts have indicated the trend is in this direction).

32. 499 F.2d 951 (8th Cir. 1974); *see also* Princess Cruises, Inc. v. Gen. Elec. Co., 143 F.3d 828, 833 (4th Cir. 1998) (identifying *Bonebrake* as the seminal case); Elbe v. Adkins, 812 F. Supp. 107, 111 (S.D. Ohio 1991) (same). A similar test to the predominant purpose test was applied to the U.C.C.'s predecessor, the Uniform Sales Act. *See* Perlmutter v. Beth David Hosp., 123 N.E.2d 792, 794 (N.Y. 1954) ("It has long been recognized that, when service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act.").

33. *Bonebrake*, 499 F.2d at 952; *see also BMC Indus., Inc.*, 160 F.3d at 1330 n.14 ("[S]ome courts believe the trend is to apply Article 2 to hybrid contracts.").

> mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g.*, contract with artist for painting) or is a transaction of sale, with labor incidentally involved (*e.g.*, installation of a water heater in a bathroom).[34]

The predominant-purpose test looks to the totality of the circumstances,[35] but specific factors courts typically consider include: (1) the contract's language, (2) the nature of the supplier's business, (3) the material's intrinsic worth and the goods' relative cost compared to the services, and (4) whether the final product the buyer bargained for may be described as goods.[36] "None of these factors alone is dispositive."[37]

With respect to the contract's language, references to "purchase order," "buyer," or "seller," and references to "defects in workmanship and materials," suggest that the contract was predominantly for the sale of goods.[38] In contrast, references to "service engineer" or "quotation for services" suggest that the contract's predominant purpose is for the sale of services.[39] With respect to the nature of the supplier's business, if the supplier's business is principally the sale of goods, this factor weighs in favor of Article 2 applying, and if the supplier's business is principally the providing of services, this factor weighs in favor of the common law applying.[40] With respect to the material's intrinsic worth, "when the contract price does not include the cost of services, or the charge for goods exceeds that for services, the con-

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34. *Bonebrake*, 499 F.2d at 960 (footnotes omitted).

35. Roto Zip Tool Corp. v. Design Concepts, Inc., 713 N.W.2d 191, No. 2004AP1379, 2006 WL 798048, at *11 (Wis. Ct. App. Mar. 30, 2006) (unpublished table decision).

36. *Princess Cruises*, 143 F.3d at 833; Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 460 (4th Cir. 1983); Linden v. Cascade Stone Co., 699 N.W.2d 189, 196 (Wis. 2005); Hensley v. Ray's Motor Co. of Forest City, 580 S.E.2d 721, 724-25 (N.C. Ct. App. 2003); Insul-Mark Midwest, Inc. v. Modern Materials, Inc., 612 N.E.2d 550, 555 (Ind. 1993); Colo. Carpet Installation, Inc. v. Palermo, 668 P.2d 1384, 1388 (Colo. 1983); *see also* 2 LAWRENCE, *supra* note 8, § 2-105:93 ("In determining which element predominates, the court must consider the essence or purpose of the contract, the circumstances surrounding the contract, the language of the contract, the method of compensating for the goods and services, and the intrinsic worth of each."). Various courts identify other factors, such as the issues involved in the dispute. *See* Heidtman Steel Prods., Inc. v. Compuware Corp., No. 3:97CV7389, 2000 WL 621144, at *5 (N.D. Ohio Feb. 15, 2000), *order clarified by* 2000 WL 33125464 (N.D. Ohio Nov. 13, 2000). The circumstances of the parties, *Linden*, 699 N.W.2d at 196, the primary reason they entered into the contract, *Insul-Mark Midwest, Inc.*, 612 N.E.2d at 555, and "whether the agreement involves one overall price that includes both goods and labor or, instead, calls for separate and discrete billings for goods on the one hand and labor on the other," *Colo. Carpet Installation, Inc.*, 668 P.2d at 1388.

37. Pass v. Shelby Aviation, Inc., No. W1999-00018-COA-R9-CV, 2000 WL 388775, at *4 (Tenn. Ct. App. Apr. 13, 2000).

38. AAF-McQuay, Inc. v. MJC, Inc., No. CIV.A.5:00CV00039, 2002 WL 172442, at *3 (W.D. Va. Jan. 10, 2002).

39. *Id.*

40. *Pass*, 2000 WL 388775, at *5.

tract is more likely to be for goods."[41] With respect to the final factor, "[o]ne . . . considers the final product the purchaser bargained to receive, and whether it may be described as a good or a service."[42] One court explained this factor as follows: "What is significant . . . is that the goods at issue here were movable when completed, unlike some contracts that only involve movable materials, which are subsequently used to construct an immovable fixture (such as a house or swimming pool)."[43]

Applying the predominant-purpose test can be difficult because the analysis is fact-specific.[44] Also, the contract often includes a single price for performance.[45] And, in many situations, the service component and the sale component are both crucial aspects of the transaction. [46] "The goods may be useless unless services are performed to make them functional. The services may be pointless in themselves, but necessary to make the goods functional. One aspect may well be useless without the other."[47]

Because of the difficulty applying the test, results can be inconsistent.[48] The test's fact-specific nature also provides the decision maker with considerable discretion to determine whether Article 2 or the common law applies.[49] And whether Article 2 or the common law applies can be outcome determinative to a litigation.[50] For example,

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41. BMC Indus., Inc. v. Barth Indus., Inc., 160 F.3d 1322, 1330 (11th Cir. 1998).

42. *Insul-Mark Midwest, Inc.*, 612 N.E.2d at 555; *see also Contracts for Goods and Services*, *supra* note 5, at 309-10 ("Under the final product analysis, the focus is on the end product, with emphasis placed on compliance with the definition of goods in the Code, that is, that the product be tangible, identifiable and have an existence independent of the services." (footnotes omitted)).

43. *BMC Indus., Inc.*, 160 F.3d at 1331 n.16.

44. Olson & Rosenstiel, *supra* note 23, at 22.

45. Miller, *supra* note 14, at 719.

46. *Id.* Importantly, however, merely because goods are specially manufactured does not mean the contract's predominant purpose is for services. As previously noted, the definition of "goods" includes "specially manufactured goods." U.C.C. § 2-105(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014); *see, e.g.*, Micro Data Base Sys., Inc. v. Dharma Sys., Inc., 148 F.3d 649, 655 (7th Cir. 1998) (questioning whether the labor involved in manufacturing goods justifies characterizing such a transaction as a hybrid contract because "labor is an input into the manufacture of every good"). Of course, at a certain point, the specialty service could predominate. *See, e.g.*, Care Display, Inc. v. Didde-Glaser, Inc., 589 P.2d 599, 605 (Kan. 1979) (holding that the predominant purpose of a contract for the construction of a trade show display was the development of an artistic or design concept, not the sale of the display).

47. Miller, *supra* note 14, at 719.

48. *Id.*; *see also* Austin Bodnar, Comment, *Mixed Transactions for Goods and Services: The Need for Consistency in Choosing the Governing Law*, 27 ST. THOMAS L. REV. 225, 244 (2015) ("When faced with a dispute arising out of a sale of both goods and services, courts inconsistently determine the applicable law.").

49. Miller, *supra* note 14, at 725.

50. *See supra* note 24 and accompanying text.

the applicable law might determine whether the contract is unenforceable because it is subject to Article 2's statute of frauds;[51] whether Article 2's "battle of the forms" rule or the common law's "mirror-image" rule applies;[52] whether the offeror's promise to keep the offer open was binding despite a lack of consideration;[53] whether a modification was binding despite a lack of new and independent consideration;[54] whether the contract includes Article 2's implied warranties;[55] whether the injured party has the privilege to terminate the contract due to an immaterial breach;[56] and whether a claim is barred by Article 2's statute of limitations.[57] Thus, a judge or jury

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51. *See* U.C.C. § 2-201(1) ("Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.").

52. *Compare id.* § 2-207(1) ("A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."), *with* E. ALLAN FARNSWORTH, CONTRACTS 161 (4th ed. 2004) ("[T]raditional contract doctrine requires that the offeree's commitment be one on the terms proposed by the offer with no variation. . . . This rule is sometimes called the 'mirror image' rule . . . .").

53. *Compare* U.C.C. § 2-205 ("An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration . . . ."), *with* MARCO J. JIMENEZ, CONTRACT LAW: A CASE AND PROBLEM-BASED APPROACH 296 (2017) ("Not only does the common law posit that offers are generally revocable, but the offeror's mere promise not to revoke the offer—or its mere statement that the offer is not revocable—has traditionally been regarded as unenforceable unless under seal or supported by consideration.").

54. *Compare* U.C.C. § 2-209(1) ("An agreement modifying a contract within this Article needs no consideration to be binding."), *with* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 209 (6th ed. 2009) ("Under the pre-existing duty rule, an enforceable agreement to modify a contract requires consideration.").

55. *See* U.C.C. § 2-314(1) ("Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."); *id.* § 2-315 ("Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose."). Of course, the U.C.C.'s inclusion of implied warranties does not mean that such warranties were not recognized by some courts under the common law. *See, e.g.*, Nova Fin. Holdings Inc. v. Bancinsure, Inc., No. 11-07840, 2012 WL 1322932, at *5 (E.D. Pa. Apr. 17, 2012) ("Judicial precedent supports this notion that Pennsylvania law has recognized implied warranties outside of the UCC.").

56. *Compare* U.C.C. § 2-601 ("Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Section 2-718 and 2-719), if the goods or the tender of delivery fail in *any respect* to conform to the contract, the buyer may (a) reject the whole . . . ." (emphasis added)), *with* PERILLO, *supra* note 54, at 374-75 ("If the breach is immaterial, the aggrieved party may not cancel the contract . . . .").

57. *Compare* U.C.C. § 2-725(1) ("An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued."), *with* Cara O'Neill,

could perform a dispensing power in the guise of determining the contract's predominant purpose. Also, deciding that a contract's predominant purpose is an issue of fact for the jury will make it difficult to resolve the issue without a trial, thereby increasing the cost of litigation. Accordingly, whether a contract's predominant purpose is one for the jury or the judge has significant implications.

III. THE LAW-FACT DISTINCTION

In deciding which questions in a trial are for the jury and which are for the judge, questions are typically divided into those of fact and those of law.[58] The jury decides questions of fact; the judge decides questions of law.[59] This general rule, known as the law-fact distinction,[60] is discussed in this Part.

In federal court, a party has a Seventh Amendment right to a jury trial in common-law actions exceeding twenty dollars.[61] Although the Seventh Amendment jury trial right has not been extended to state lawsuits, [62] all states provide for a right to jury trial in a civil action.[63] Thus, a party is entitled to a jury trial in a breach-of-contract action, at least when the injured party is seeking damages rather than solely equitable relief.[64]

But simply because a party is entitled to a jury trial does not mean the jury will decide all issues in the lawsuit. The Seventh Amendment is designed to preserve the jury's fact-finding role in common-law suits.[65] Thus, although the Supreme Court has not de-

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Small Claims Statutes of Limitations, NOLO (Oct. 5, 2017), http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html [https://perma.cc/K27N-NKQV] (noting the state statute of limitations for breach of contract range from two years to fifteen years).

58. James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 147 (1890).

59. *Id.*

60. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003).

61. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

62. *See* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.").

63. *See* Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 565 (2001) ("In all but two states there is a constitutionally-based right to a civil jury trial. Louisiana and Colorado, which do not provide for the right by constitution, nonetheless provide the protection by statute and by court rule, respectively.").

64. *See In re* Valley Steel Prods. Co., 147 B.R. 189, 191 (Bankr. E.D. Mo. 1992) ("The . . . counts alleging breach of contract, breach of bailment and conversion are the type of common law causes for which the Seventh Amendment preserves a party's right to a jury trial.").

65. Balt. & Carolina Line v. Redman, 295 U.S. 654, 657 (1935) ("The aim of the Amendment . . . is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the com-

cided "the extent to which the Seventh Amendment can be said to have crystallized a law/fact distinction,"[66] under the Seventh Amendment, disputed issues of fact are typically decided by the jury, whereas issues of law are decided by the judge.[67] State courts generally take the same approach.[68]

The Seventh Amendment does not, however, require all questions of fact to be decided by the jury.[69] For example, the judge makes factual findings necessary to determine subject-matter jurisdiction, personal jurisdiction, supplemental jurisdiction, venue, and whether to abstain in favor of another court (or an agency).[70] The judge also makes factual findings regarding the competency of witnesses and the admission of evidence.[71]

The Seventh Amendment does not provide a right to a nonjury trial.[72] As noted by one commentator, "[i]t is useful to distinguish between the jury's *right* to decide questions of law and its *power* to do so."[73] Thus, a court has the power to have the jury decide an issue that would ordinarily be decided by the judge. [74]

But "the line between law and fact is not clear, and so decision-making authority does not divide cleanly along these lines."[75] The difficulty arises principally in the fact/law spectrum's middle range,[76] the "shadowy middle ground between fact and law."[77] For example, lying between findings of historical facts (historical facts are "who did

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mon-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.").

66. Markman v. Westview Instruments, Inc., 517 U.S. 370, 384 n.10 (1996).

67. 35B C.J.S. *Federal Civil Procedure* § 986 (2017). The Seventh Amendment does not require all factual disputes in an action at law be decided by the jury. For example, the judge decides factual disputes regarding subject-matter jurisdiction, personal jurisdiction, venue, whether to abstain in favor of another court (or an agency), and whether to exercise supplemental jurisdiction. Pavey v. Conley, 544 F.3d 739, 741 (7th Cir. 2008).

68. Moses, *supra* note 63, at 565.

69. *See* Chance v. E. I. Du Pont De Nemours & Co., 57 F.R.D. 165, 169 (E.D.N.Y. 1972) ("Constitutional guarantees of a jury trial in actions at law in federal courts do not mandate a jury determination of every issue of fact.").

70. *Pavey*, 544 F.3d at 741; *see also Chance*, 57 F.R.D. at 169 ("Jurisdictional facts are illustrative of those which may properly be resolved by the court.").

71. Amiot v. Ames, 693 A.2d 675, 679 (Vt. 1997).

72. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959).

73. Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170 n.2 (1964) [hereinafter *Changing Role of the Jury*].

74. Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1908 (1966).

75. Allen & Pardo, *supra* note 60, at 1778.

76. Schwarzer et al., *supra* note 2, at 457.

77. *Id.* at 458.

what, when, where, how, why, or with what intent"[78] and are typically considered a jury question)[79] and announcing the applicable principles of law (a judge question)[80] is the application of the law to historical facts. This process of law application has been called fact interpretation as well as resolving mixed questions of law and fact,[81] with the resulting conclusion called an "ultimate fact."[82] It has been argued that "[u]ltimate facts occupy a broad segment of the spectrum between fact and law [and] [w]here on that spectrum a particular ultimate fact belongs depends on whether it is predominantly factual or legal."[83]

Typically, courts have considered fact interpretation to be the jury's province.[84] Thus, "instances are legion in which the reviewing court discerns a question of fact, not of law, when opposing inferences may reasonably be drawn from nonconflicting evidence."[85] Accordingly, the jury has three tasks in a typical civil case. First, it determines

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78. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 n.3 (1986). A historical fact has been defined as "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548 (1965) (emphasis omitted). Historical facts are also called primary or pure facts, Marc E. Sorini, *Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases*, 82 GEO. L.J. 563, 586 (1993), pure historical facts, Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 116 (2005), and adjudicative facts, 23 COLO. PRAC. *Evidence Law* § 201:1 Westlaw (database updated Oct. 2017).

79. *See* David S. Welkowitz, *Who Should Decide? Judges and Juries in Trademark Dilution Actions*, 63 MERCER L. REV. 429, 432 (2012) ("In theory, juries are supposed to decide historical facts . . . .").

80. "Law" has been defined as "a body of general principles and rules, predicated in advance, awaiting application to particular facts as may arise. Law does not deal with the circumstances of a particular situation; it announces what is to be the rule in all cases." Newell Cos. v. Kenney Mfg. Co., 864 F.2d 757, 779 (Fed. Cir. 1988) (Newman, J., dissenting) (citations omitted).

81. RICHARD C. WESLEY & DAVID H. TENNANT, 6 BUSINESS AND COMMERCIAL LITIGATION FEDERAL COURTS § 60:19 (Robert L. Haig ed., 4th ed. 2016) ("These 'mixed questions of fact and law' present themselves as: 'questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' ").

82. Schwarzer et al., *supra* note 2, at 456. Some commentators argue that the phrase "mixed questions of law and fact" should only be used when law application involves disputed historical facts, and that the phrase "question of law" should be used when law application involves undisputed historical facts. *Id.*

83. *Id.* at 457.

84. EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 2:3 (2016).

85. Lacy v. Cal. Unemployment Ins. Appeals Bd., 95 Cal. Rptr. 566, 570 (Cal. Ct. App. 1971).

the historical facts.[86] Second, it reviews the judge's instructions to learn the applicable principles of law.[87] Third, it applies those principles of law to the historical facts and reaches a verdict.[88]

In a certain sense, when the applicable principle of law consists of a vague standard rather than a bright-line rule,[89] the unavoidable result of entrusting law application to the jury is that the jury is given the discretion to fill in the law's details.[90] "Since in the Anglo-American legal system many questions of application are considered to be questions of fact, the jury has wide discretion in applying the law and is therefore a 'trier' of law as well as of fact."[91] As one court stated, "In civil actions legal analysts have recognized that when the jury goes beyond deciding 'what happened' and formulates the particular standard of conduct . . . it is really drawing a conclusion of law."[92]

Unfortunately, however, jury instructions are often drafted in a way that makes it difficult for jurors to understand the law.[93] As Professor Lawrence Friedman has noted, "[t]he instructions tend to be dry, dreary, stereotyped—antiseptic statements of abstract rules. They are couched in cautious lawyer-talk. Often, it is hard to see how lay juries can make heads or tails of these 'instructions.' "[94] In fact, studies show that jurors, while competent to decide historical facts, have difficulty applying the law to them.[95]

Bland, abstract jury instructions do, however, help maintain jury autonomy by giving jurors considerable discretion in applying the law

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86. Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 871 (1995).

87. *Id.*

88. *Id.*; *see also* Robert P. Lawry, *The Moral Obligation of the Juror to the Law*, 112 PENN ST. L. REV. 137, 138 (2007) (noting that the jury applies the law to the facts).

89. *See* MindGames, Inc. v. W. Publ'g Co., 218 F.3d 652, 657 (7th Cir. 2000) ("A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale. A speed limit is a rule; negligence is a standard.").

90. *See* Gergen, *supra* note 1, at 409 ("[F]act-specific normative judgments made at the point of application of a standard will be made by the jury as an incident to fact finding."); Richard D. Friedman, Comment, *Generalized Inferences, Individual Merits, and Jury Discretion*, 66 B.U. L. REV. 509, 511 (1986) ("In part because of the hopelessness of articulating a more specific standard, we leave the final lawmaking, the determination of a specific rule to govern the case at bar, to the jury.").

91. Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 494-95 (1986).

92. Somers v. Superior Court, 108 Cal. Rptr. 630, 635 (Cal. Ct. App. 1973).

93. Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 525 (1997).

94. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 103 (3d ed. 2005).

95. J. Kevin Wright, Comment, *Misplaced Treasure: Rediscovering the Heart of the Criminal Justice System Through the Use of the Special Verdict*, 19 T.M. COOLEY L. REV. 409, 411-12 (2002).

to the facts.[96] Likewise, "the courts have adopted some potent devices to close their eyes and ears when juries violate instructions. For example, most juries are asked to give a general verdict, thus increasing the difficulty of determining whether they obeyed instructions."[97] Thus, the general rule of entrusting the jury with law application gives the jury substantial power to decide the law, a power that is not obvious on the face of the law-fact distinction.

But despite the general rule that law application is the province of the jury, there are numerous circumstances in which law application has been deemed an issue of law for the judge.[98] For example, the application of a statute's terms to undisputed historical facts is generally considered a question of law.[99] And, of course, a judge may always take law application from the jury when the judge concludes no reasonable fact finder could draw more than one inference from the historical facts.[100]

Unfortunately, courts deciding whether a particular question of law application should be considered one of fact for the jury or one of law for the judge do not often find relevant precedent, and courts often fail to state their reasoning for concluding it is one or the other.[101] Thus, while the law-fact distinction is often identified as the test for determining whether the judge or jury decides an issue, it is more realistic to state that the jury should decide questions the court believes are simply labeled "questions of fact" and the judge should decide questions the court believes are simply labeled "questions of law."[102] And it is not easy to articulate a theoretical reason why some law application is left to the jury and some to the judge.[103] As one court stated, "Cases involving the application of law to facts are hopelessly at odds with one another as to whether the issue should be reviewed as a factual finding or a legal conclusion."[104]

Further complicating the matter is that deciding whether an issue is one of fact for the jury or one of law for the judge is considered a

96. FRIEDMAN, *supra* note 94, at 103-04.

97. Friedman, *supra* note 90, at 510.

98. *Id.* If the court concludes that the issue of law application is one of law for the court, but the historical facts are in dispute, the court may have the jury return a special verdict. Schwarzer et al., *supra* note 2, at 456 n.55.

99. United States v. Rule Indus., Inc., 878 F.2d 535, 541 (1st Cir. 1989) (quoting Stissi v. Interstate & Ocean Transp. Co., 765 F.2d 370, 374 (2d Cir. 1985)) (citations omitted in original).

100. BRUNET ET AL., *supra* note 84, § 2.3(b); *see also* 75A AM. JUR. 2D *Trial* § 615 (2007) ("Generally, when the facts are not disputed, and only one reasonable inference can be drawn from them, a question is one for the court; in all other cases, it is for the jury.").

101. Schwarzer et al., *supra* note 2, at 458.

102. LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 593 (6th ed. 1996).

103. *Rule Indus., Inc.*, 878 F.2d at 541 (quoting Zuckerman, *supra* note 91, at 495 n.26).

104. Sampson v. Richins, 770 P.2d 998, 1004 (Utah Ct. App. 1989).

procedural issue, not a substantive one unless the right to a jury trial is a substantial part of the rights accorded by a statute.[105] Accordingly, in a federal diversity (or supplemental jurisdiction) case, federal law generally determines whether an issue is one of fact for the jury or one of law for the court.[106] Likewise, in a state lawsuit applying the law of a different state, whether an issue is one of fact for the jury or one of law for the court is generally determined by the forum state's law.[107] Thus, if a state court has decided whether a particular issue of law application involving a claim under its own state law is one of fact or law, that decision is not typically binding on a federal court or on another state court applying the first state's substantive law. And if a federal court has decided whether a particular issue of law application involving a state claim is one of fact or law, that decision is not binding on a state court.

Although courts do not often explain their reasoning for declaring a particular issue of law application as one of fact or law, courts have generally used a functional test, deciding whether the judge or jury is better capable of deciding the issue.[108] The Supreme Court has even provided guidance for when federal courts should consider an issue one of fact for the jury and when it should be an issue of law for the judge. Barring evidence that the issue or an appropriate analogy was treated as a question for the jury under English practice in 1791 (which would require it to be submitted to the jury under the Seventh Amendment), the federal court should consider (1) existing precedent, (2) the relative skills of judges and juries, and (3) the policies to be furthered by the allocation.[109]

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105. Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952).

106. Deland v. Old Republic Life Ins. Co., 758 F.2d 1331, 1335 (9th Cir. 1985); *see also* Simler v. Conner, 372 U.S. 221, 222 (1963) (per curiam) ("[T]he right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions."); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958) ("It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."); Nunez v. Superior Oil Co., 572 F.2d 1119, 1125 (5th Cir. 1978) ("[A]lthough the substantive issues are governed by state law pursuant to *Erie*, federal law governs the allocation of issues raised between judge and jury." (footnote omitted)); Reiner v. New Jersey, 732 F. Supp. 530, 533-35 (D.N.J. 1990) (stating that the plaintiff with a pendent state claim is entitled to a jury trial because the right to a jury in federal court is determined by federal law). *But see* Richard C. Worf, Jr., *The Effect of State Law on the Judge-Jury Relationship in Federal Court*, 30 N. ILL. U. L. REV. 109, 109 (2009) (challenging this view).

107. Hoeper v. Air Wis. Airlines Corp., 232 P.3d 230, 237 (Colo. App. 2009), *aff'd*, 320 P.3d 830 (Colo. 2012), *rev'd on other grounds*, 134 S. Ct. 852 (2014).

108. BRUNET ET AL., *supra* note 84, § 2:3(b).

109. Markman v. Westview Instruments, Inc., 517 U.S. 370, 384 (1996); *see also* Miller v. Fenton, 474 U.S. 104, 114 (1985) ("At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that,

Commentators have also weighed in on the relevant factors to be considered under the functional test. One commentator noted that this "functional inquiry involves several factors, including [1] whether the issue falls within the common experience of jurors, [2] whether its resolution involves the kinds of decisions traditionally entrusted to jurors, and [3] whether a judgment of peers is desirable."[110] Professor Stephen Weiner asserted that factors to be considered should include "[1] the relative competence of judge and jury with respect to a specific example of law application, and the [2] sacrifice in uniformity and predictability which would result in a particular case from entrusting law application to jury rather than judge."[111]

The functional test places particular reliance on the relative competence of the judge or the jury to decide the issue. If the law application "requires 'experience with the mainsprings of human conduct' and reference to 'the data of practical human experience,' " the issue is typically considered one for the jury.[112] Examples include:

> [W]hether a defendant used due care in the operation of a vehicle or was driving in the course of employment or whether that person's acts were the proximate cause of plaintiff's injuries [or] . . . . [W]hether a person had reasonable cause, acted within a reasonable time, or can be charged with notice . . . .[113]

The classic statement of this rationale came in *Sioux City & Pacific Railroad Co. v. Stout*, in which the Supreme Court held that whether particular conduct constitutes negligence is typically an issue for the jury, explained as follows:

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

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as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.").

110. Schwarzer et al., *supra* note 2, at 459.

111. Weiner, *supra* note 74, at 1876.

112. Nunez v. Superior Oil Co., 572 F.2d 1119, 1126 (5th Cir. 1978) (quoting Comm'r v. Duberstein, 363 U.S. 278, 289 (1960)).

113. Schwarzer et al., *supra* note 2, at 457 (footnotes omitted).

> In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.[114]

The Court recently reiterated that "when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer."[115] Another court stated that cases holding law application was an issue of fact for the jury "involved the application of fact-sensitive, rather amorphous legal standards to an extensive set of nuanced facts. All required a choice among various reasonable inferences and the exercise of everyday, common sense judgment."[116] For example, the Supreme Court has recognized "the jury's unique competence in applying the 'reasonable man' standard."[117]

Thus, law application is often considered an issue of fact because it gives the jury discretion to apply community norms.[118] Granting this role to the jury helps generate public confidence in the judicial system.[119] Some consider this one of the most beneficial aspects of the right to a jury trial, even if in the process of applying community norms the jury deviates from the law.[120]

On the other end of the law-fact distinction are ultimate facts that are predominantly legal because they involve matters of policy.[121] In such situations, it can be assumed that the judge is more competent than the jury to apply the law to undisputed historical facts.[122] As

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114. 84 U.S. (17 Wall.) 657, 664 (1873).

115. Hana Fin., Inc. v. Hana Bank, 135 S. Ct. 907, 911 (2015).

116. United States v. Rule Indus., Inc., 878 F.2d 535, 541 (1st Cir. 1989).

117. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 n.12 (1976); *see also* Hamling v. United States, 418 U.S. 87, 104-05 (1974) (emphasizing "the ability of the juror to ascertain the sense of the 'average person' " by drawing upon "his own knowledge of the views of the average person in the community or vicinage from which he comes" and his "knowledge of the propensities of a 'reasonable' person"); *Stout*, 84 U.S. at 664 ("It is assumed that twelve men know more of the common affairs of life than does one man, [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.").

118. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 904 (1999).

119. Zuckerman, *supra* note 91, at 496.

120. *See id.* at 495 (discussing this view).

121. *Id.* at 495 n.26.

122. BRUNET ET AL., *supra* note 84, § 2:3(c). The distinction between community (or social) norms and policy can be described as follows: "Social norms are rules of conduct that govern interactions among individuals within a reference group. Norm violations often provoke disapproval and loss of esteem . . . ." H. Peyton Young, *Social Norms and Public Policy*, BROOKINGS (Oct. 31, 2007), https://www.brookings.edu/research/social-norms-and-public-policy [https://perma.cc/K79L-G8RL]. "Policy" is "[t]he general principles by which a

stated by the Supreme Court, "[r]egarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact."[123] Thus, "[i]f a decision will immediately affect a class of persons or groups, making it in the nature of judicial rule making, it generally should be treated as a question of law."[124] Not surprisingly, whether a contract violates public policy is considered an issue of law.[125]

Similarly, an important consideration under the functional test is whether the decision is likely to have a significant precedential effect on an issue that would benefit from consistent results.[126] This is known as the general/particular distinction.[127] Under this distinction, if a particular issue's resolution is only important for the particular case, then it is more likely to be labeled an issue of fact.[128] In contrast, when the particular factors are complex, and the result will have greater precedential value, the issue should generally be considered one for the judge.[129]

Thus, for example, determining expectation damages for the breach of a contract, which involves estimating where the injured party would have been had the defendant not breached,[130] is considered an issue of fact because its relevance is limited to the particular case.[131] In contrast, one court held that "the question of the legal consequence of an open campus high school policy is not a random judgment best left to case-by-case assessment, but a question likely to recur and one on which school boards need some guidance."[132]

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government is guided in its management of public affairs." *Policy*, BLACK'S LAW DICTIONARY 1276 (9th ed. 2009).

123. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 n.17 (1984).

124. Schwarzer et al., *supra* note 2, at 459.

125. Gergen, *supra* note 1, at 446-47.

126. *Id.*; *see also* Friedman, *supra* note 90, at 511 ("[A]llowing the jury to determine the particulars of a rule abandons, to some extent, the hope that the adjudicative system will apply the same rule to all parties similarly situated. Sometimes this is not a serious problem. For example, given an auto accident case, it may be highly improbable that a second case will ever present exactly the same significant circumstances. In other contexts, such as antitrust, jury lawmaking creates more significant difficulties.").

127. Whitford, *supra* note 1, at 932.

128. *Id.*

129. Cline v. Yamaga, 158 Cal. Rptr. 598, 603 (Cal. Ct. App. 1979).

130. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981) ("[T]he injured party has a right to damages based on his expectation interest . . . ."); *id.* § 347 cmt. a (defining "expectation interest" as the injured party's interest in having "the benefit of his bargain by . . . put[tting] him in as good a position as he would have been in had the contract been performed").

131. Whitford, *supra* note 1, at 932.

132. Rogers *ex rel.* Standley v. Retrum, 825 P.2d 20, 24 (Ariz. Ct. App. 1991).

Important considerations with respect to the policies to be furthered by the allocation are good case management and sensible judicial administration.[133] For example, issues involving whether the forum court can or should hear the case—matters including subject-matter and personal jurisdiction, venue, and abatement—are considered issues of law, presumably because "juries do not decide what forum a dispute is to be resolved in."[134] "Juries decide cases, not issues of judicial traffic control."[135] Similarly, most courts hold that choice of law is an issue of law for the judge, even if the judge must make factual findings to determine the applicable law.[136] With respect to choice of law, it is necessary for the judge to decide the matter so she can

> [D]etermine if [the] plaintiff has established a prima facie case and [s]he must tell the jury what the issues of fact are that they must decide as determined by the applicable law. A similar grasp of applicable law is required if the court is to rule intelligently on questions of relevancy.[137]

Another important issue is whether there should be a presumption that law application should be for the jury. For example, Professor Weiner argued, "[a]s a working rule, the task of law application should be entrusted to the jury, unless there are compelling reasons in a given case why the court should perform this function."[138]

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133. *See In re* Facebook Biometric Info. Privacy Litig., 185 F. Supp. 3d 1155, 1161 (N.D. Cal. 2016) (referring to "the perspective of good case management" as a consideration in deciding whether an issue should be treated as one of fact for the jury or one of law for the judge); *see also* Chance v. E. I. Du Pont De Nemours & Co., 57 F.R.D. 165, 170 (E.D.N.Y. 1972).

134. Pavey v. Conley, 544 F.3d 739, 741 (7th Cir. 2008).

135. *Id.*

136. *See, e.g.*, Vaz Borralho v. Keydril Co., 696 F.2d 379, 386-87 (5th Cir. 1983) ("We hold . . . that under the circumstances of this case, the choice of law issues . . . were properly determined by the district court."), *overruled on other grounds by In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987); *In re Facebook Biometric Info.*, 185 F. Supp 3d at 1161 ("[T]he best approach is for the Court to resolve fact disputes subsumed in deciding choice of law."); *Chance*, 57 F.R.D. at 167 (holding that the judge should decide issues of fact upon which choice of law depends); Amiot v. Ames, 693 A.2d 675, 680 (Vt. 1997) (holding that "factual determinations necessary to decide which state or country has the most significant relationship to the occurrence and parties are better left to the court, even when the ultimate determination of the facts is left to a jury," and noting that "other courts have generally agreed that choice-of-law determinations are properly left to the court"). *But see* Marra v. Bushee, 447 F.2d 1282, 1284 (2d Cir. 1971) ("Because the plaintiff made a general demand for a jury trial, the defendant was entitled to the jury's consideration of every issue properly triable to it. One such issue was the situs of defendant's conduct, a factual determination upon which the choice of law turned." (citation omitted)); Orr v. Sasseman, 239 F.2d 182, 186-87 (5th Cir. 1956) (approving the trial court's instruction to the jury that included finding of fact necessary to determine choice of law).

137. *Chance*, 57 F.R.D. at 168 (citations omitted).

138. Weiner, *supra* note 74, at 1919.

He maintains that "[t]he rationale for such an approach is the frequently expressed policy in favor of trial by jury, springing from constitutional guaranties."[139]

For example, at the founding of the country, there was greater distrust of the judge than the jury, and the jury played a much more significant role in trials.[140] "It is common to think of the civil jury as a reflection of this country's willingness to abide by the results of popular democracy, or of our faith in the wisdom of the common person."[141] In the nineteenth century, however, the jury came to be perceived as an adjunct of the court, rather than "an adjunct of local communities which articulated into positive law the ethical standards of those communities."[142] It was around this time that the law-fact distinction gained prominence.[143] The jury was thus denied the right to determine the law, and at the same time, the judge's power to comment on the facts was restricted.[144] "This division of function, it was hoped, made a more rational, predictable system of justice possible, especially in commercial cases."[145]

The case against a greater role for juries is premised on the belief that with respect to deciding certain matters, the jury is less competent than the judge.[146] In particular, judges are viewed as "more capable of correctly deciding complicated or technical issues and are more likely to render decisions that are predictable, consistent, and efficient."[147] In contrast, juries are viewed "as unpredictable, less likely to understand complex issues, less sympathetic to large business interests, and more likely to make awards based on the deep pocket of the defendant."[148] But Professor Margaret Moses points out that "empirical evidence does not support a generally negative view of juries. Nor does it support the view that judges are less biased, or

139. *Id.*

140. *Changing Role of the Jury*, *supra* note 73, at 171-73.

141. Whitford, *supra* note 1, at 943.

142. FRIEDMAN, *supra* note 94, at 104 (quoting WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 170-71 (1975)).

143. FRIEDMAN, *supra* note 94, at 104.

144. *Changing Role of the Jury*, *supra* note 73, at 173.

145. FRIEDMAN, *supra* note 94, at 104.

146. Moses, *supra* note 63, at 592-93 (footnotes omitted).

147. *Id.* at 592.

148. *Id.* at 592-93.

are superior decision makers."[149] Thus, we are left with two very different views about the value of the jury.[150]

But because of the frequently expressed policy in favor of a trial by jury, there should be a presumption in favor of a particular issue of law application being decided by the jury. The issue should be decided by the judge only if the previously discussed factors under the functional test weigh strongly in favor of the judge.

In sum then, when applying the functional test, the factors a court should consider in deciding whether an issue is for the jury or the judge include: (1) the relative competence of the judge and jury with respect to the particular issue, taking into account whether the issue falls within the common experience of jurors; (2) whether a decision from peers is desirable; (3) the desirability of uniformity and predictability; (4) good case management and sensible judicial administration; and (5) whether the resolution of this type of issue has traditionally been left to the jury. If the factors do not weigh strongly in favor of the judge deciding the issue, it should be left to the jury.

IV. COURTS AND THE PREDOMINANT-PURPOSE TEST AS AN ISSUE OF FACT OR LAW

When reasonable persons could disagree about a contract's predominant purpose, the question has arisen as to who has the power to determine the source of law—the judge or the jury. Courts, however, disagree on whether it is generally an issue of law for the court or generally an issue of fact for the jury.[151]

One of the earliest cases to hold that it is generally an issue of law is *Valley Farmers' Elevator v. Lindsay Bros. Co.*, decided by the Minnesota Supreme Court in 1987.[152] The court, without citation to authority, simply stated that "[t]he question as to the classification of a hybrid contract is generally one of law."[153] Subsequent courts have followed *Valley Farms' Elevator* without extended discussion. In

149. *Id.* at 596.

150. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 183 (2000) ("In the United States, there are two very different views of the value of the civil jury. The first is that the civil jury is a cornerstone of democratic government, a protection against incompetent or oppressive judges, and a way for the people to have an active role in the process of justice. The second is that civil juries are inefficient, unpredictable, swayed by sympathy, and incompetent to decide complex cases." (footnote omitted)).

151. *See* Golden v. Den-Mat Corp., 276 P.3d 773, 792 (Kan. Ct. App. 2012) ("Courts have split over whether the predominant purpose of a mixed contract presents an issue of law for the court or a question of fact for the jury.").

152. 398 N.W.2d 553 (Minn. 1987), *overruled on other grounds by* Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990).

153. *Id.* at 556.

MBH, Inc. v. John Otte Oil & Propane, Inc., a Nebraska appellate court, citing *Valley Farms Elevator* and a Wisconsin case, simply stated that "[w]e . . . agree with courts from other jurisdictions that have held that the determination of whether goods or nongoods predominate a contract is generally a question of law."[154] A federal district court in Minnesota followed *Valley Farmers' Elevator*, simply stating that "[t]he determination of whether goods or services predominate is generally a question of law."[155] Wisconsin and Arizona hold that it is a question of law because the issue involves interpretation of an unambiguous contract.[156]

But it has been argued that "even if the predominate purpose of a mixed contract [is] a question of law, any conflicts in the material historical facts would have to be resolved at trial with the jury providing answers to special interrogatories to inform the court's legal determination."[157] Similarly, some courts hold that a contract's predominant purpose is only a factual issue if there is a true factual dispute (a dispute about historical facts), and not just when it is a close call as to the contract's prominent purpose. The leading case is *Valleaire Golf Club, Inc. v. Conrad*,[158] a decision by an Ohio appellate court, wherein the court stated:

> The trial judge specifically asked Valleaire, "[W]hat is the disputed fact in this case [regarding the contract's predominant purpose], based so far on our evidence?" Counsel for Valleaire failed to point to any disputed facts but instead asserted that "it is a close call" because nearly fifty percent of the contract price was attributable to the cost of the materials and a close call should be decided by the jury, not the trial judge. The fact that the facts presented a "close call" merely demonstrated that the issue was a factual question, not that it was one that could not be decided by the trial judge . . . . In . . . the . . . cases cited by Valleaire, the facts were not merely close, they were disputed. Because Valleaire did not demonstrate to the trial court that there were disputed facts

154. 727 N.W.2d 238, 245-46 (Neb. Ct. App. 2007).

155. AKA Distrib. Co. v. Whirlpool Corp., 948 F. Supp. 903, 906 (D. Minn. 1996), *aff'd*, 137 F.3d 1083 (8th Cir. 1998).

156. Generations Ranch, LLC v. Zarbock, No. 1 CA-CV 10-0771, 2012 WL 161814, at *3 (Ariz. Ct. App. Jan. 19, 2012); Micro-Managers, Inc. v. Gregory, 434 N.W.2d 97, 100 (Wis. Ct. App. 1988). Arizona cases state that it is often an issue of fact, but this was presumably a reference to a situation in which the historical facts are in dispute. *See* Double AA Builders, Ltd. v. Grand State Constr. L.L.C., 114 P.3d 835, 842 (Ariz. Ct. App. 2005) ("Determining the predominant purpose of the contemplated contract is often a question of fact."); *Generations Ranch, LLC*, 2012 WL 161814, at *3 ("Determining the predominant purpose of such a contract often involves resolving issues of fact, but whether a contract is predominantly one for goods or services is ultimately an issue of law." (citations omitted)).

157. Golden v. Den-Mat Corp., 276 P.3d 773, 792-93 (Kan. Ct. App. 2012).

158. No. 03CA0006-M, 2003 WL 22900451 (Ohio Ct. App. Dec. 10, 2003).

> regarding the predominant purpose of this contract, it failed to demonstrate to the trial court that this was a jury issue. Consequently, Valleraire [sic] has failed to demonstrate that the trial court erred in deciding this issue.[159]

This approach has continued to be followed in Ohio state courts,[160] as well as in federal district courts in Ohio[161] and Kentucky.[162] Presumably, if there are disputed historical facts, the jury in these jurisdictions is permitted to apply the facts to the law, rather than providing answers to special interrogatories.

Other courts hold a determination of a contract's predominant purpose is a question of fact.[163] A Kansas court explained that it should be an issue of fact, even when the contract's language is unambiguous, because the predominant-purpose test looks beyond the language:

> [D]etermining whether goods or services predominate in a mixed contract necessarily looks beyond the contractual language. It in-

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159. *Id.* at *2.

160. *See* H & C Ag Servs., LLC v. Ohio Fresh Eggs, LLC, 41 N.E.3d 915, 923 (Ohio Ct. App. 2015) (holding that a contract's predominant purpose should not have been submitted to the jury because there were no disputed facts); Allied Erecting & Dismantling Co. v. Ohio Edison Co., 34 N.E.3d 182, 186 (Ohio Ct. App. 2015) ("When the predominant purpose of the contract is undisputed, the matter becomes a question of law.").

161. *See* Stainbrook v. Fox Broad. Co., No. 3:05 CV 7380, 2006 WL 3757643, at *6 (N.D. Ohio Dec. 19, 2006) ("Whether the predominant purpose is for goods or services is a factual question, and when there are no disputed facts regarding the predominant purpose of the agreement, the trial judge may make the determination."); Mécanique C.N.C., Inc. v. Durr Envtl., Inc., 304 F. Supp. 2d 971, 976 (S.D. Ohio 2004) ("A jury . . . should only resolve this issue if there is a true factual dispute, not if the division between goods and services merely involves a close call.").

162. Boardman Steel Fabricators, Ltd. v. Andritz, Inc., No. 14-2-GFVT, 2015 WL 5304293, at *4 (E.D. Ky. Sept. 9, 2015); Jair United Inc. v. Inertial Airline Servs., Inc., No. 3:12-CV-799-H, 2013 WL 4048539, at *3 (W.D. Ky. Aug. 9, 2013).

163. *See* C.J. Mahan Constr. Co. v. Valspar Corp., 30 F. App'x 381, 383 (6th Cir. 2002) (following Ohio law); BMC Indus., Inc. v. Barth Indus., Inc., 160 F.3d 1322, 1331 (11th Cir. 1998); Downriver Internists v. Harris Corp., 929 F.2d 1147, 1151 (6th Cir. 1991) (following Michigan law); United States v. City of Twin Falls, 806 F.2d 862, 870 (9th Cir. 1986), *overruled on other grounds as recognized by* Ass'n of Flight Attendants v. Horizon Air Indus., Inc., 976 F.2d 541, 551-52 (9th Cir. 1992); Brooks v. Serv. Am. Corp., No. C05-1468JLR, 2007 WL 98475, at *2 (W.D. Wash. Jan. 9, 2007); Akrosil Div. of Int'l Paper Co. v. Ritrama Duramark, Inc., 847 F. Supp. 623, 627 (E.D. Wis. 1994); Conopco, Inc. v. McCreadie, 826 F. Supp. 855, 868 (D.N.J. 1993), *aff'd*, 40 F.3d 1239 (3d Cir. 1994) (unpublished table decision); Allied Shelving & Equip., Inc. v. Nat'l Deli, LLC, 154 So. 3d 482, 484 (Fla. Dist. Ct. App. 2015); DeGroft v. Lancaster Silo Co., 527 A.2d 1316, 1323-24 (Md. Ct. Spec. App. 1987); Higgins v. Lauritzen, 530 N.W.2d 171, 173 (Mich. Ct. App. 1995); Quality Guaranteed Roofing, Inc. v. Hoffmann-La Roche, Inc., 694 A.2d 1077, 1079 (N.J. Super. Ct. App. Div. 1997); Urban Indus. of Ohio, Inc. v. Tectum, Inc., 612 N.E.2d 382, 386 (Ohio Ct. App. 1992); Tacoma Athletic Club, Inc. v. Indoor Comfort Sys., Inc., 902 P.2d 175, 179 (Wash. Ct. App. 1995). Illinois provides that it is generally a question of fact, but there are times when it can be decided as a matter of law. *See, e.g.*, Bruel & Kjaer v. Village of Bensenville, 969 N.E.2d 445, 453-54 (Ill. Ct. App. 2012).

> cludes the reasons the buyer purchases the goods and the nature and extent of the integration of those goods with the related services. It likely requires detailed information about the goods and the services over and above what may be described in the contract. Given the case-specific inquiry and the factually driven nature of the determination, essentially considering all of the circumstances bearing on the transaction, we conclude the issue of predominance of goods or services in a mixed contract is fundamentally one of fact. As such, it typically should be left for the trier of fact rather than resolved on summary judgment.[164]

Some of these courts, however, state that "where the agreement is unambiguous, and there are no facts in dispute, it is not error for the court to rule, as a matter of law, whether a contract is for goods or services."[165] Another court stated:

> [W]hen the evidence so clearly indicates undisputed facts that no jury issue remains to be resolved, it is proper for the court to rule on the issue. Thus, if the contract was unambiguous, it was not error for the district court to make its determination as a matter of law.[166]

These courts seem to hold that it is only an issue of fact if there are historical facts in dispute, which would arguably place these courts in the "issue of law" camp.

Unfortunately, however, none of these courts have provided much—if any—analysis as to why a contract's predominant purpose should be an issue of law for the court or an issue of fact for the jury. Accordingly, the following Part undertakes such an analysis.

V. ANALYSIS

This Part applies the functional test to determine whether the classification of a hybrid contract should be considered an issue of fact for the jury or an issue of law for the court. Each of the factors set forth in Part III will be considered.

An underlying assumption in this Part is that there is no federal or state right to a jury trial on the issue. With respect to the Seventh Amendment, a particular issue must be submitted to the jury when the question or an analogous one was regarded as a jury issue under the English practice in 1791.[167] Because the U.C.C. was adopted in the mid-twentieth century, there would be no historical evidence that this question or an analogous one was regarded as a jury issue under English practice at the relevant time. For actions in state court, the

164. Golden v. Den-Mat Corp., 276 P.3d 773, 792 (Kan. Ct. App. 2012).

165. *Akrosil*, 847 F. Supp. at 627.

166. *City of Twin Falls*, 806 F.2d at 870.

167. Markman v. Westview Instruments, Inc., 517 U.S. 370, 377 (1996).

state right to a jury trial would need to be applied, but assuming that the state right is similar to the Seventh Amendment right, there would likely be no state right to have the jury decide a contract's predominant purpose. Of course, this does not mean that the jury should not decide the issue. That question can only be answered by applying the functional test and its relevant factors.

A. Relevant Competence of Judge and Jury with Respect to Classifying a Hybrid Contract

With respect to the first factor—relative competence—a judge is likely to be more competent than a jury in deciding a contract's principal purpose because hybrid contracts will often involve commercial practices with which the judge will probably have more experience through professional training and experience. As noted by Judge Richard A. Posner, "[j]urors rarely have commercial experience, and are generally, and I think correctly, considered unreliable judges of contract issues."[168] Professor Mark Gergen has noted that "in contract law there are frequent appeals to the values of professional judgment: by these I mean the values we place on having normative determinations made by people with legal training and the perspective of judges."[169]

But this greater competence is likely to be insubstantial. Each transaction will be different, and individual jurors might have professional knowledge regarding the type of transaction that the judge does not. With so many different types of hybrid contracts spanning so many different types of business practices, it is unlikely a judge will have any particular expertise at understanding the nature of the transaction. Determining whether the principal purpose of a particular transaction was its sale of goods portion or its service portion will often be difficult to answer only because the evidence is close—not because the evidence is particularly complicated.

Also, the issue is more on the fact end of the spectrum than the law end. The question is what the parties' predominant purpose was in entering into the contract, arguably an issue of historical fact. Even if the test is an objective one (i.e., what would a reasonable person believe was the parties' predominant purpose based on what they manifested, rather than what they actually believed), answering that

168. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1594 (2005). Karl Llewellyn, the U.C.C.'s principal drafter, proposed merchant juries to resolve disputes between merchants but his proposal was rejected. Gergen, *supra* note 1, at 442.

169. Gergen, *supra* note 1, at 410.

question would, in practice, likely be no different from determining what the parties actually intended.

A judge would, of course, be more competent at deciding whether Article 2 should apply to a particular transaction for policy reasons. For example, in a well-known case decided under the U.C.C.'s predecessor, the Uniform Sales Act, the New York Court of Appeals relied in part on policy to hold that the Sales Act (and its implied warranty) did not apply to a blood transfusion.[170] Similarly, in another case, a court held that Article 2's implied warranty of fitness for a particular purpose extended to a beauty parlor operator applying product to a patron's hair, which caused injury to the patron's hair and scalp. That decision was based primarily on policy reasons.[171]

The weakness with this argument, however, is that the predominant-purpose test focuses solely on whether the sales portion is the transaction's predominant purpose and does not include as a factor whether Article 2 should (or should not) apply for policy reasons. Also, most cases involving hybrid contracts will not invoke strong policy reasons for applying (or not applying) Article 2.

In those limited situations in which the court believes that Article 2 should (or should not) apply for policy reasons, the court could hold as a matter of law what source of law applies. Because the U.C.C. does not address how to determine whether Article 2 applies to a hybrid contract, and because there is likely no right to a jury trial on the issue of a hybrid contract's classification, there is no impediment to a court declaring as a matter of law whether certain recurring transactions are governed by Article 2. Thus, although this factor weighs in favor of the judge deciding the issue, it weighs in that direction only slightly.

Accordingly, because application of the predominant-purpose test is typically fact based rather than policy based, the test is different from a choice-of-law analysis that typically requires a determination of which state has the most significant relationship to the occurrence and the parties.[172] The significant-relationship test sets forth a number of factors that are based on policy considerations that would not be suitable for jury resolution. For example, the relevant factors include:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the [particular] issue,

170. Perlmutter v. Beth David Hosp., 123 N.E.2d 792, 793-96 (N.Y. 1954).

171. Newmark v. Gimbel's Inc., 258 A.2d 697, 702 (N.J. 1969).

172. RESTATEMENT (SECOND) CONFLICT OF LAWS § 146 (AM. LAW INST. 1971).

(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.[173]

As one court noted, "[c]ertainly a jury is not equipped to engage in the kind of investigation and delicate balancing called for in section 6(2)."[174] A jury is better equipped, however, to determine a contract's predominant purpose.

Accordingly, in general, neither the judge nor the jury seems to be more competent at deciding a contract's predominant purpose. For contracts involving complicated transactions, however, a judge would likely be more competent.

B. Whether a Decision from Peers is Desirable

Unlike, say, a finding of negligence, determining a contract's predominant purpose does not involve a declaration of a community's norms. Rather, as discussed above, the test simply asks what the parties' predominant purpose was in entering into the contract. The jury is not asked to make any judgment about the parties' behavior. Accordingly, this factor does not weigh in favor of a jury deciding the issue.

C. Desirability of Uniformity and Predictability

As previously discussed, the predominant-purpose test looks to the totality of the circumstances,[175] and applying the test to a hybrid contract is thus fact specific.[176] This is shown by the multiple factors courts consider. Thus, each transaction will have its own facts to be considered. Even with cases involving similar facts, it might be reasonable to conclude that the parties' predominant purpose in one transaction was the sale of goods portion and in the other transaction, the services portion. Accordingly, a determination in a particular case will have relatively little importance for subsequent cases. If the question of a contract's predominant purpose was considered an issue for the court, any particular determination would have little precedential value for future cases.

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173. *Id.* § 6(2).

174. Chance v. E. I. Du Pont De Nemours & Co., 57 F.R.D. 165, 170 (E.D.N.Y 1972).

175. Roto Zip Tool Corp. v. Design Concepts, Inc., 713 N.W.2d 191, No. 2004AP1379, 2006 WL 798048, at *11 (Wis. Ct. App. Mar. 30, 2006) (unpublished table decision).

176. Olson & Rosenstiel, *supra* note 23, at 22.

There are, however, two arguments relating to uniformity and predictability that weigh in favor of the issue being decided by the judge. The first argument relates to the U.C.C.'s purposes, which include simplifying and clarifying the law governing commercial transactions and making the law uniform among the various jurisdictions.[177] By enabling the jury to decide a hybrid contract's principal purpose—and thereby decide whether Article 2 applies—these goals will be frustrated. By denying stare decisis effect to determinations of a hybrid contract's principal purpose, parties will be less able to predict whether their transaction is governed by Article 2. This will in turn make it more difficult for parties to know their rights and resolve their disputes. These concerns, however, are not likely to be substantially alleviated by making the issue one of law for the court. Because of the fact-specific nature of the predominant-purpose test, precedent will be of little value in predicting the outcome of one's case.

The second argument is that there will be certain recurring transactions in which it will be important for parties to know, prior to the transaction, whether certain provisions of the U.C.C. will apply. An obvious example is whether implied warranties will apply. But, as previously discussed, for those areas in which policy is implicated, the court can decide the issue as a matter of law. Accordingly, for those areas where predictability and uniformity are particularly important, the court may decide the issue as a matter of law. In general, however, it seems that the desirability for uniformity and predictability is not particularly strong with respect to determining a hybrid contract's predominant purpose.

D. Good Case Management and Sensible Judicial Administration

One of the principal reasons most courts consider the issue of choice of law to be a question of law for the court is the desire for good case management and sensible judicial administration. In the leading case holding that the court should typically decide issues of fact upon which choice of law depends, the court argued that:

> The question of what the substantive law is must normally be resolved by the judge because he must determine if plaintiff has established a prima facie case and he must tell the jury what the issues of fact are that they must decide as determined by the applicable law. A similar grasp of applicable law is required if the court is to rule intelligently on questions of relevancy.[178]

177. U.C.C. § 1-103(a) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

178. *Chance*, 57 F.R.D. at 168 (citations omitted).

Similarly, considering it an issue for the jury "precludes the efficient disposal of cases through motions to dismiss or for summary judgment, forcing parties to undergo the time and expense of trial only to risk having their case eventually dismissed upon some collateral jurisdictional ground."[179] Providing the jury with instructions dependent upon which law it determines should be applied could also result in potential complexities,[180] and its determination of which law applies could create "a cumbersome, delay ridden, and potentially confusing and time wasting process."[181] As explained by one court:

> The reasons why that would be a bad practice [to permit the jury to decide disputed questions of fact upon which choice of law depends] are self-evident. The litigants and the fair and efficient administration of justice would suffer immensely from slogging through all the pretrial activities of discovery, class certification, and dispositive motions, and then a full trial, without knowing which law governs the case. The consequences of doubled or trebled litigation costs, destabilizing uncertainty about dispute outcomes, and overall case management chaos are too plain to be debated. And the Court can only imagine with apprehension what jury instructions and verdict forms would look like in a case that required the jury to first pick the governing law.[182]

Similar concerns exist with permitting the jury to decide a contract's predominant purpose. By permitting the jury to essentially decide what law applies, the judge would have greater difficulty determining what evidence is relevant than if the choice-of-law issue was decided in advance by the judge. Also, it would make many cases difficult to resolve through a motion to dismiss or for summary judgment. And the jury instructions could become unduly complicated. Accordingly, issues of good case management and sensible judicial administration favor the predominant-purpose test being treated as an issue of law for the court, even if that includes the judge deciding disputed historical facts upon which that determination depends.

Courts that have held choice-of-law issues to be for the court as a matter of law have recognized that there are "rare situation[s] [in which] a choice-of-law fact dispute is so bound up in the substantive claims that the court cannot decide it without compromising the constitutional guarantee of a jury [trial] resolution."[183] The leading case holding that the jury should decide disputed issues of fact upon which

179. Amiot v. Ames, 693 A.2d 675, 679 (Vt. 1997).

180. *Id.*

181. *Chance*, 57 F.R.D. at 170.

182. *In re* Facebook Biometric Info. Privacy Litig., 185 F. Supp. 3d 1155, 1161 (N.D. Cal. 2016).

183. *Id.* at 1161-62.

choice of law depends is generally considered an example of such a situation.

In *Marra v. Bushee*, the Second Circuit held that it was for the jury to decide where the defendant's wrongdoing principally occurred, which in turn would determine which state's law applied.[184] The case involved a claim for loss of consortium arising out of a marital affair that occurred in two different states, and the state in which the affair primarily occurred would determine which state law applied.[185] The court stated: "Because the plaintiff made a general demand for a jury trial, the defendant was entitled to the jury's consideration of every issue properly triable to it. One such issue was the situs of defendant's conduct, a factual determination upon which the choice of law turned."[186] The reach of *Marra*'s broad language has been limited by subsequent courts, however, who point out that in *Marra*, the choice of law determination—which required determining where the affair had primarily occurred—"was effectively the ultimate dispute in the case."[187] Thus, it is generally recognized that resolving disputed issues of historical fact upon which choice of law depends are only for the jury when "the merits of [the plaintiffs'] case [are] 'factually meshed' so that a hearing or ruling thereon would have disposed of the merits of their cause of action."[188]

Accordingly, in those cases where a disputed issue of historical fact upon which the predominant-purpose test depends is so enmeshed with the merits of the case, the interest of good case management and sound judicial administration would be outweighed by the interest in having a jury decide disputed historical facts. In general, however, good case management and sensible judicial administration weigh in favor of the judge deciding a contract's predominant purpose.

E. Resolution of the Type of Issue Traditionally Left to Judge or Jury

Contract law has traditionally provided a greater role for decisionmaking by the court than has negligence law.[189] "[U]nlike negli-

184. 447 F.2d 1282, 1285 (2d Cir. 1971).

185. *Id.* at 1283-84.

186. *Id.* (citations omitted).

187. *In re Facebook Biometric Info.*, 185 F. Supp. 3d at 1162; *see also* Chance v. E. I. Du Pont De Nemours & Co., 57 F.R.D. 165, 170 (E.D.N.Y. 1972) (distinguishing *Marra* because there "the District Court made a choice of law determination in deciding the action on the merits").

188. Vaz Borralho v. Keydril Co., 696 F.2d 379, 387 (5th Cir. 1988), *overruled on other grounds by In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987).

189. Allen & Pardo, *supra* note 60, at 1782.

gence doctrine, which gives juries both the fact-finding and application functions, contract law in general . . . den[ies] jury participation on what one would think are obviously basic fact-finding functions."[190] The most similar examples to the issue of characterizing a hybrid contract's predominant purpose are those involving the interpretation and scope of a written contract.

For example, contract interpretation is often considered an issue of law for the judge, despite the meaning the parties attached to their agreement being "indisputably a matter of fact, not of law."[191] The traditional view that the interpretation of a written contract is for the judge might have been based on "a distrust of unsophisticated, uneducated, and at one time illiterate jurors."[192] This traditional view is still widely followed when no extrinsic evidence is introduced.[193] The *Restatement (Second) of Contracts* adopts a position that is more willing to submit an issue of contract interpretation to the jury, providing that the jury should decide the issue if interpretation "depends on the credibility of extrinsic evidence *or on a choice among reasonable inferences to be drawn from extrinsic evidence*"[194]—an approach followed by many courts.[195]

Also, whether an agreement is partially or totally integrated, and thus whether the parol evidence rule discharges prior agreements not incorporated into the written contract, is considered a question of law for the judge.[196] This is true even though it has been argued that the parol evidence rule is designed to effectuate the parties' intentions about whether the prior agreement was superseded.[197] It has been argued that it is considered an issue for the judge because of distrust of the jury and that the proponent of extrinsic evidence will often be the economic underdog with whom the jury will sympathize.[198]

Determining a contract's predominant purpose does not, however, raise similar concerns. With respect to juror illiteracy, that is no longer a concern, and determining a contract's predominant purpose

190. *Id.* at 1783.

191. FARNSWORTH, *supra* note 52, § 7.14 at 476.

192. *Id.* at 477.

193. *Id.*

194. RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (AM. LAW INST. 1981) (emphasis added).

195. FARNSWORTH, *supra* note 52, § 7.14 at 478.

196. *See* RESTATEMENT (SECOND) OF CONTRACTS § 210(3) ("Whether an agreement is completely or partially integrated is to be determined by the court . . . .").

197. *See* Daniel P. O'Gorman, *Closing a Parol Evidence Rule Loophole: The Consideration Exception and the Preexisting Duty Rule*, 8 NE. U. L.J. 307, 328-31 (2016) (discussing the so-called merger (or integration) rationale for the parol-evidence rule).

198. *See* Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365, 366 (1932).

goes beyond the contract's language. With respect to a concern that jurors will be biased in favor of economic underdogs, such a rationale should not always be considered when determining the allocation of powers between a judge and a jury because that would create a presumption in favor of judges engaging in law application, rather than the converse. Thus, this factor should be considered in those limited situations in which the issue is one which would give the jury considerable discretion to favor the economic underdog. For example, with respect to the parol evidence rule, the outcome of the case will often hinge on the parol evidence. With respect to a hybrid contract's predominant purpose, although a jury might manipulate its decision to have a source of law that is favorable to a sympathetic party, the relationship between that determination and a case's outcome is likely to be sufficiently attenuated such that a concern about manipulation is not strong.

Determining a hybrid contract's predominant purpose—which in turn determines the applicable source of law—could be likened to factual findings made to determine subject-matter and personal jurisdiction, venue, motions to abstain in favor of another court (or an agency), or whether to exercise supplemental jurisdiction—all findings made by the judge.[199] These issues, however, all involve determining the forum in which the dispute is to be resolved[200]—a substantially different issue from determining the applicable source of law.

More pertinent, therefore, is who decides factual disputes relevant to choice-of-law determinations. As previously noted, this is an issue over which there is apparent disagreement.[201] But most courts hold it

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199. Pavey v. Conley, 544 F.3d 739, 741 (7th Cir. 2008).

200. *See id.* ("The generalization that emerges from these examples and others that might be given is that juries do not decide what forum a dispute is to be resolved in. Juries decide cases, not issues of judicial traffic control.").

201. *Compare* Orr v. Sasseman, 239 F.2d 182, 186 (5th Cir. 1956) (holding that it was proper for the jury to decide the question of where loss of consortium occurred for purposes of applying Georgia or Illinois law), *with* Gramercy Mills, Inc. v. Wolens, 63 F.3d 569, 571 (7th Cir. 1995) ("Judges, not juries, decide questions of law, such as choice of law issues."); Vaz Borralho v. Keydril Co., 696 F.2d 379, 386-87 (5th Cir. 1983) (holding choice of law determination is an issue of law), *overruled on other grounds by In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987), AEI Life, LLC v. Lincoln Benefit Life Co., 225 F. Supp. 3d 136, 144 (E.D.N.Y. Dec. 22, 2016) ("Determining whether a choice of law clause is enforceable—or, if a conflict of laws exists, where is the center of gravity in the dispute—requires factual findings to be made by the court . . . ."), Toll v. Tannenbaum, 982 F. Supp. 2d 541, 552 (E.D. Pa. 2013) (holding that factual disputes regarding choice-of-law determination are for the court), *aff'd,* 596 F. App'x 108 (3d Cir. 2014), Coltec Indus. Inc. v. Zurich Ins. Co., Nos. 99 C 1087, 99 C 3192, 2004 WL 413304, at *4 (N.D. Ill. Jan. 30, 2004) ("The court, not the jury, is responsible for making any factual determinations necessary to resolve the choice-of-law issue based on a prepon-

is an issue of law for the judge, even when there are disputed historical facts.[202] As previously discussed, those few decisions that held it was an issue of fact dealt with situations in which a disputed issue of historical fact upon which the choice-of-law issue depended was enmeshed with the merits of the case. Accordingly, the most analogous situation is generally considered to be an issue of law, even when there are disputed historical facts.

VI. PROPOSED SOLUTION

Part V's analysis of the factors under the functional test showed the following: the judge is likely slightly more competent to determine a hybrid contract's predominant purpose. The issue is not one where a decision by peers is desirable. While predictability and uniformity would be improved by the judge deciding this issue, the gains would be slight. The judge plays a greater role in contract cases than other types of cases, though the reasons given for this greater role are not particularly applicable to characterizing a hybrid contact. Good case management and sensible judicial administration weigh in favor of the court deciding the issue, including disputed historical facts. And the most analogous situation—choice of law—is generally considered an issue of law for the court.

Because of the multitude of factors, and because some favor the jury and some the judge, reasonable persons will thus disagree on where the balance tips. Importantly, if the balance must tip strongly in favor of the judge to take the issue away from the jury, the argument for jury resolution is compelling. But courts are perhaps the best judges of good case management and sound judicial administration, and this factor has played an important role in courts deciding that choice of law should be an issue for the court. The application of the factors in Part V reveals why courts have been unable to agree on whether the issue should be considered one of fact for the jury or one of law for the court. Of course, the parties can always agree to have the judge decide the issue,[203] but there is reason to suspect that agreement might often be difficult to obtain.

Ultimately, because there is likely no right to a jury trial on the issue of a contract's predominant purpose, and because there is no right to a nonjury trial, the best course of action is for the court to

derance of the evidence standard."), *and* Nunez v. Hunter Fan Co., 920 F. Supp. 716, 718 (S.D. Tex. 1996) (holding the judge should decide factual issues regarding choice of law).

202. Amiot v. Ames, 693 A.2d 675, 680 (Vt. 1997).

203. *See, e.g.*, FED. R. CIV. P. 49(a)(3) ("A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue.").

decide on a case-by-case basis whether the benefits of taking the case from the jury are clearly outweighed by the benefits of having the judge decide the issue. When making that determination, the court should consider relevant factors under the functional test.

For example, the relative competence of the judge and the jury will vary in particular cases. In some cases, the transaction might be sufficiently complex such that the judge decides a jury is much less competent to resolve the issue. In less complex transactions, the judge might decide that the jury is as competent as the judge. With respect to good case management and sensible judicial administration, the judge might conclude that the particular issues involved in the case (and the amount and complexity of the differences between the Article 2 and common-law rules that are implicated) would make jury instructions that included different versions of the law too confusing for the jury. Or the judge might decide that the benefits of an early resolution outweigh the benefits of having the jury decide the issue. The judge might also decide that the issue is one of law because policy considerations dictate whether Article 2 should apply to the transaction, such as whether implied warranties should attach.

A particularly important issue should be whether any historical facts upon which the issue depends are disputed. If historical facts are disputed, this should be a factor that weighs in favor of having the jury decide the issue, particularly if the historical fact is enmeshed with the merits of the case. But merely because the historical facts are in dispute should not mean the issue is one for the jury. If other factors weigh heavily in favor of the issue being decided by the court, the court should decide disputed historical facts, as it does with respect to choice-of-law determinations. If the court determines that the issue should be decided by the court, and there are historical facts in dispute, the court could hold an evidentiary hearing on the issue, perhaps early in the case. Of course, if the relevant historical facts are not in dispute, and the court decides that a reasonable fact finder could reach only one conclusion, the court should not submit the issue to the jury.

The trial judge's decision whether to submit the issue to the jury would then be subject to appellate review under an abuse of discretion standard. Thus, not only must a party object to the judge's determination to preserve it for appeal, the trial judge's determination should be presumed correct, and thus the objecting party would have the burden of establishing that the judge's determination was an

abuse of discretion.[204] Of course, if the trial judge held that Article 2 applied (or did not apply) for policy reasons, such a determination should be subject to de novo review. Similarly, the appellate court should not hesitate to determine as a matter of law that certain types of hybrid contracts should be governed by Article 2 or the common law for policy reasons, or because the type of hybrid contract is one that will sufficiently recur such that the need for uniformity and predictability outweighs competing factors. Also, if the appellate court decides that a reasonable person could only have come to one conclusion regarding the contract's predominant purpose, and the trial judge or jury reached the opposite conclusion, that determination should be reversed.[205]

VII. CONCLUSION

The disagreement between courts about whether a contract's predominant purpose is an issue of law for the court or one of fact for the jury discloses that the factors bearing on the allocation of responsibility between judge and jury are in tension with respect to this particular issue. Because the strength of the factors will vary based on the circumstances of the case, a sensible solution is to provide the trial judge with the discretion to decide, on a case-by-case basis, whether to submit the issue to the jury.

204. *See* 5 AM. JUR. 2D *Appellate Review* § 623 (2007) ("[A] discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion.").

205. Of course, if the jury made the determination, and a general verdict form was used, it might not be possible to know the jury's determination.